FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER ET AL.,

Petitioners,

v.

MARIE MANHART ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE ASSOCIATION FOR WOMEN IN MATHEMATICS AND THE WOMEN'S EQUITY ACTION LEAGUE AS AMICI CURIAE

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INTEREST OF AMICI CURIAE[1]

The Association for Women in Mathematics is a non-profit corporation formed in 1971 to encourage greater participation of women in mathematics by psychological reinforcement, by bringing women mathematicians together and by working wherever possible to encourage and implement the principles of affirmative action among men and women mathematicians. The Association's membership is international and includes female

[1] The parties' letters of consent to the filing of this brief have been filed with the clerk pursuant to Rule 42(2).

and male mathematicians, statisticians, engineers, accountants and other professionals. A large proportion of the membership is engaged in teaching and research at American colleges and universities. The Association has been actively seeking to modify employment based pension plans which differentiate on the basis of sex in the payment of benefits or in the standards for determining contributions.

The Women's Equity Action League (WEAL) is a non-profit nationwide membership organization incorporated under the laws of Ohio with national offices in the District of Columbia. Established in 1968, WEAL seeks to promote greater economic progress for American women, to press for full enforcement of anti-discrimination laws on behalf of women and to seek correction of *de facto* sex discrimination. WEAL has placed primary emphasis on the elimination of sex-discrimination in employment and education and has pursued its goals through litigation, monitoring the enforcement activities of federal and state agencies and through research and publication of pertinent information and data. One of the employment practices which WEAL has challenged is the differentiation between men and women in employment based pension plans. By filing charges with the Equal Employment Opportunity Commission on behalf of members, WEAL has specifically attacked the practice of higher education institutions providing pension plans which pay lower periodic pension benefits to women than they pay to male employees. The practice challenged here is one aspect of the larger problem of pension and employment discrimination which WEAL seeks to eliminate.

It is the intention of amici to discuss the component parts and structure of pension plans within the framework of Title VII. While it is conceded that the single issue presented in this case concerning differentiation by sex in pension contributions can be decided

without addressing the larger question of whether Title VII prohibits the use of sex-based actuarial tables in the pension industry for the computation of costs or benefits, discussion of the broader questions has been initiated throughout this litigation and is of considerable concern to persons affected by the sex based contribution and benefit differentials which exist under certain pension plans, in particular those operated by public employers and higher education institutions.

ARGUMENT

A PRIMA FACIE VIOLATION OF TITLE VII IS ESTABLISHED WHERE ALL FEMALE EMPLOYEES MUST PAY EXTRA CONTRIBUTIONS TO AN EMPLOYMENT BASED PENSION PLAN IN ORDER TO RECEIVE THE SAME BENEFITS AS SIMILARLY SITUATED MALE EMPLOYEES.

Resolution of the principal discrimination issue in this case rests on whether Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. 2000e-2, *et seq.*, permits an employer to provide a retirement plan as a fringe benefit which requires all female employees to pay higher monthly contributions in order to receive the same periodic benefits as male employees who have worked the same number of years at the same salary and retired at the same age. Drawing analytical support from *General Electric v. Gilbert,* 429 U.S. 125 (1976), the pension issue raised by the practice of the Employer, the City of Los Angeles Department of Water and Power, has been characterized by its proponents as one dealing with a differentiation based on longevity rather than sex in order to remove the challenged practice from the ambit of scrutiny under Title VII.

In the operation of the City of Los Angeles, Department of Water and Power retirement plan, referred to hereafter as the Department's plan or the pension plan, regardless of other reliable predictors of longevity, male employees are placed in a single category based on their

sex for the purpose of determining their contributions to the pension plan. All female employees, without regard to predictable estimates for individual longevity, are treated as the longer-lived of the two groups based solely on their sex. This subdivision of the employee population is obviously not one based on longevity. If it were, all persons, male *and* female, who have certain characteristics and lifestyles which contribute to longevity would be placed in a common class of predictably long or short lived persons. Since all men, regardless of their prospects for old age are treated as if they will die younger than similarly situated females, and all women, regardless of indications of probable early death, are placed in a single category, unlike the subclassification of pregnant women discussed in *General Electric v. Gilbert, supra,* the classifications used in the Department's plan to determine costs and pension contributions separate men and women into separate sex based classes without any other distinction.

As a general proposition, Title VII of the 1964 Civil Rights Act, as amended, prohibits covered employers from treating male and female employees differently based on their sex. Under Section 703(a)(1), (42 U.S.C. 2000e-2(a)(1)), an employer shall not "fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's . . . sex . . ." Under Section 703(a)(2), (42 U.S.C. 2000e-2(a)(2)), an Employer may not "limit, segregate or classify" employees because of their sex. The plain language and interpretations of Title VII support a conclusion that male and female employees may not be treated, for the purpose of employment benefits, including employment based pensions, as separate classes of employees because of their sex. The danger of disadvantaging one group

which is inherent in sex based treatment of employees is precisely the harm which Title VII aims at eliminating.

The lower courts have uniformly held that Title VII applies to pension plans as terms or conditions of employment and, with one exception, have also concluded that the Act prohibits different treatment of men and women in the amount of benefits paid or in the terms established for a pension plan. See *Chastang v. Flynn & Emerich Co.,* 541 F.2d 1040 (4th Cir. 1976), where the Employer's pension plan violated Title VII because individual male employees who retired early received approximately half the benefits that comparable female early retirees received; *Fitzpatrick v. Bitzer,* 390 F. Supp. 278 (D. Conn. 1974), 519 F.2d 559 (2d Cir.), modified on other grounds, 424 U.S. 445 (1976), where the Employer's plan violated Title VII because it discriminated in favor of women over men in the number of years of service required for retirement and in the computation of retirement benefits; *Rosen v. Public Service Electric & Gas Co.,* 477 F.2d 90 (3rd Cir. 1973), where Title VII was violated because stricter requirements were applied to male employees in regard to age and benefit amounts for early retirement and female employees were discriminated against in regard to mandatory retirement age; *Bartmess v. Drewery's U.S.A., Inc.,* 444 F.2d 1186 (7th Cir.), cert. denied, 404 U.S. 936 (1971), where an employment based pension plan which established a lower mandatory retirement age for women was held to violate Title VII's sex discrimination prohibition; *Fillinger v. East Ohio Gas Co.,* 4 FEP Cases 73 (N.D. Ohio 1971), where an employment based pension plan which required women employees to retire at age 62 and males at age 65 was found to violate Title VII; *Henderson v. State of Oregon,* 405 F. Supp. 1271 (D.Ore. 1975), where an employer plan which paid lower benefits to all female

employees was held to violate Title VII; cf., *E.E.O.C. v. Colby College,* ____ F. Supp. ____ (D.Me. 1977), where the court applied the language of Title VII as interpreted in *General Electric v. Gilbert, supra,* to permit an employment based pension plan which paid lower benefits to all female employees and a life insurance plan which paid lower benefits to all male employees.

In order to lay to rest the question of whether or not a *prima facie* case of sex discrimination is established under Title VII where all females must pay extra contributions in order to receive the same pension benefits as comparable males, it is necessary to examine the proposition of "actuarial equivalence" since monetary values which are not equal in fact may be described as actuarially equal or theoretically equivalent. The phrase "actuarially equivalent" has been defined to mean that if "the present values of two series of payments are equal, taking into account a given interest rate and mortality according to a given table, the two series are said to be actuarially equivalent on this basis." American Council of Life Insurance, *Pension Facts,* 1976, p. 44. The two key variables used in determining the actuarial equivalence of two sums are the interest rates paid on the invested funds and the mortality tables utilized in estimating costs and/or potential benefits. Thus, a male and female employee who are similar in all other relevant respects will have actuarially equivalent pensions if the same mortality table is used to compute costs and benefits, and if the interest earned by the fund is the same. To illustrate the impact of an increase in interest earnings on a pension fund, one expert has stated that "a change from one mortality basis to another is generally of lesser importance than a ¼% change in the valuation rate of interest." Fellers and Jackson, *Non-Insured Pension Mortality: The UP-1984 Table,* (1975), p. 30. The importance of interest earnings on pension plans

established by public employers has been described in another way:

> In the past, investments by state and local plans tended to be more conservative than private plans. In recent times, however, their portfolios have become more diverse, including a higher percentage of common stock, in order to increase investment income. According to actuarial estimates, in a mature, reasonably well-funded plan, a one percent annual increase in investment earnings, produced from asset appreciation, realized gains or interest, can produce a ten percent decrease in annual cost. American Council of Life Insurance, *Pension Facts 1976,* p. 33.

Actuarial equivalency is also affected by the mortality table which is chosen by an actuary to assist in estimating costs by predicting the number of person years a fund must cover. Constructed to estimate probable numbers of deaths at various ages, a mortality table may be, and frequently is, modified to reflect changes in group experience. Fellers, *et al., Handbook for Pension Planning* (1949), pp. 153-156. It is noteworthy that the so-called "single sex" tables which are most frequently used by pension funds are, for the most part, mortality tables constructed from male experience only:

> As a practical matter different mortality tables are rarely used for males and females. What has been done more frequently in practice is to use an age setback in the male table as an approximation of female mortality. . . . The mortality table that is eventually used for valuing females usually has been based on all-male mortality experience and does not reflect any of the significant characteristics of the female mortality experience. Fellers and Jackson, *supra,* p. 4.

Mortality tables are useful as tools in estimating the total costs or liability of a pension plan which, in turn, helps to define the contribution rates necessary to fund a certain benefit level. Mortality tables are not, however,

the only factors used by actuaries to estimate the costs of funding a pension plan. Interest earned on investments, as indicated earlier, is another important variable. Other considerations include capital appreciation and depreciation, the rate of employee turnover, salary scales and projected salary increases, method of plan administration, retirement age, benefit levels, vesting provisions and level of employee contributions. Fellers, *supra,* pp. 150-166. The flexibility in estimating costs provided by these considerations is demonstrated by the following statement concerning the impact which an increase in retirement age will have on reduction in costs:

> . . . [A]ssume for the moment that normal retirement will not take place at age 65 as assumed, and we want to know the effect on costs if retirements (including early retirements) take place, on the average, at age 66 or at age 67. On this basis one might count on the long-range costs being reduced by possibly seven percent if retirements take place at age 66, on the average, or by 15 percent if retirements take place at age 67, if we can assume that there will be no very substantial mortality improvement among people over age 65. Fellers, *supra,* at 166.

Besides being only one among many factors considered by actuaries in pricing the cost of pension benefits, mortality tables can be restructured by actuaries to reflect changing social attitudes or legal requirements as they are periodically restructured to reflect increases in longevity. Just as race is no longer considered in establishing mortality tables, sex should not be either:

> Federal Government pressure via the E.E.O.C. for treating males and females in exactly the same way recalls to mind the fact that the government took a similar position some decades ago with respect to race and imposed a requirement that insurance companies charge exactly the same

> premiums for the same coverage irrespective of race, in spite of the fact that all of the published mortality experience then available, including the mortality statistics published with every decennial census indicated clearly that there were very significant differences in mortality rates and trends by race. Fellers and Jackson, *supra,* p. 3.

Unlike pregnancy which affects a subclass of females, death is egalitarian in its reach. What sex-divided mortality tables obscure is the significant overlap that in fact exists in male and female death ages. A comparison of death overlap between men and women illustrates the similarity between them — a similarity in death ages that far outweighs the differences. Eighty-four percent of men and women who live beyond age 65 share common death ages. Out of a group of 1000, if each woman who dies at a particular age is paired with a man who dies at the same age, eighty-four percent of the population will have been paired. The remaining 16 percent are women who live longer, unmatched by men, and men who die earlier, unmatched by women. Bergmann and Gray, "Equality in Retirement Benefits," *Civil Rights Digest,* Fall (1975), pp. 25-27.

It would be more in keeping with the insurance principle of sharing risks over a large group to treat retirees in a particular plan as "persons" and thus spread the costs of the longer-lived and the savings of the shorter-lived, which are not exclusive to either sex, over the entire pension plan population. Some men do live longer than the average life expectancy for their own sex and longer than the average female life expectancy. A retired male annuitant who outlives the statistically or actuarially "average" male or female is not thereafter punished for his longevity by a reduction in monthly pension benefits. A female, though, is penalized from the outset of her employment with the Los Angeles Department of Water and Power for her

presumed longevity, whether or not it is likely that she will actually outlive the "average" male or the "average" female. Where sex separate tables are used to determine contributions or benefits, every retired female employee is penalized because a few women live longer and every man benefits because a few men die earlier.

It is apparent that in comparing death ages for men and women a significant similarity is demonstrated which could be the basis for merging sex based mortality tables. Thus, just as an entire employee complement now shares the risks and benefits of individual involvement in aviation, military service or dangerous sports, the use of tobacco, drugs or alcohol, or even a poor medical history, a sex neutral mortality table would spread the risks and benefits of sex characteristics over the entire annuitant population. See, Bernstein and Williams, Title VII and the Problem of Sex Classifications in Pension Programs, 74 *Colum. L. Rev.* 1203, 1220 (1974); Comment, "Gender Classifications In the Insurance Industry," 75 *Colum. L. Rev.* 1381, 1381 (1975).

The use of sex differentiated mortality tables to determine pension costs and contributions establishes what in effect is a conclusive presumption that all women, regardless of any other relevant considerations, will live longer than all similarly situated men. In the face of a significant overlap in death ages between men and women, this presumption is sharply rebutted. While it may be actuarially convenient for pension trusts and insurance companies to divide humanity into two sex-based subclasses that empirically or statistically conform to established models, such sex-based treatment should not be permitted where factors other than sex may be used to predict longevity and to determine contributions and benefits. Administrative ease has been rejected as a defense to sex based conclusive presumptions in cases decided under the

Fifth and Fourteenth Amendments. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974); *Frontiero v. Richardson,* 411 U.S. 677 (1973), *Turner v. Department of Employment Security,* 423 U.S. 44 (1976); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975). To the extent that these cases define activity as prohibited sex-discrimination under the Fifth or Fourteenth Amendment, they are a "useful starting point" in interpreting Title VII's sex discrimination prohibition in the area of pension benefits. *General Electric v. Gilbert, supra,* at 133.

Under Title VII, employment decisions and practices are to be sex neutral and sex based differentiations cannot be justified by sex based statistics, beliefs or formulas. Thus, an employer could not decide to pay women lower salaries than comparable male employees because the employer knows for a fact, supported by statistics, that women as a class earn lower salaries than men or because the employer believes that women need less money than men. Thus, if an employer could demonstrate through the use of a sophisticated formula that his female employees as a class receive more wages than his male employees and that the male and female wages were actuarially equivalent, would it be permissible under Title VII for the employer to pay individual females lower wages based on this formula? One expert phrases the issue in regard to mortality tables another way.

> For any person, the variables race and sex are static, while age is a dynamic variable increasing at the same rate for everyone. The values of the race/sex variables for any individual are known from birth, but everyone is "assigned" an age variance with a value that is unknown until death. [May an actuary] . . . ignore all static variables except sex and still claim that the use of sex alone is not arbitrary and discriminatory? Martin, Gender Discrimination In Pension Plans: Comment, *Journal of Risk and Insurance,* 145, 148 (1977).

There are no valid reasons related to the functioning of the Department of Water and Power, or to the fundamental purpose of retirement plans or the financial needs of male and female retirees which would justify or require sex-based distinctions in contribution formulas. All other benefits and risks attributed to subclasses of employees are shared over the entire employer population. The burden placed on female employees of subsidizing all longer-lived retirees should be equally borne by male and female employees since both are potential recipients of long-term benefits and some members of each sex will in fact live beyond the statistical models established by the insurance and pension industry. Requiring women as a class to pay more to receive the same pension benefits as comparable males is *prima facie* sex discrimination under Title VII that cannot be justified based on a discriminatory sex-based formula even if that formula is actuarially acceptable. Both the practice of unequal contributions and the causative factors, the single-sex mortality tables, should be prohibited in employment based pension plans under Title VII.*

* The substantial contributions of Professor Mary W. Gray in the preparation of this brief are grateful acknowledged.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be affirmed.

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